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May 30, 1996

Mr. William F. Caton, Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D. C. 20554

In the Matter of:

Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98

Dear Mr. Caton:

Enclosed are an original and sixteen copies of the Reply Comments of Cincinnati Bell Telephone Company in the above referenced proceeding. A duplicate original copy of this letter and attached Reply Comments is also provided. Please date stamp this as acknowledgment of its receipt and return it. Questions regarding these Reply Comments may be directed to Ms. Patricia Rupich at the above address or by telephone on (513) 397-6671.

Sincerely,

David L. Meier

David L. Meier

Enclosure

cc: Janice Myles (Paper and disk copy)
International Transcription Services, Inc.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
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REPLY COMMENTS OF CINCINNATI BELL TELEPHONE COMPANY

SUMMARY

Cincinnati Bell Telephone Company ("CBT"), an independent, mid-size local exchange carrier, submits these reply comments in response to the numerous comments filed in this proceeding relating to the Commission's proposed rules released April 19, 1996 to implement Sections 251 and 252 of the Telecommunications Act of 1996 (the "Act").[1] In its original comments filed in this proceeding, CBT expressed its concern that the unique circumstances of CBT and other small and mid-size companies may be overlooked when the rules are implemented by the Commission.

CBT asserts that the Commission should not impose unrealistic time frames for meeting the requirements of the Act. The time frames for implementation should be negotiated between the LEC and the requesting carrier.

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[1] In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Case No. 96-98, Notice of Proposed Rulemaking, released April 19, 1996. See also, Telecommunications Act of 1996, Pub. L. 104-104, §§ 251-252.

CBT is concerned that many of the comments of IXCs and other new entrants suggest that ordering, billing, provisioning, maintenance and repair systems be fully mechanized. CBT recommends that the Commission not prescribe minimum standards in this area.

CBT reiterates its position that the minimum elements required to be unbundled under the Act should be loops and ports. CBT restates its position that the TSLRIC method is the appropriate means to develop the cost of a service, but not to set a price for a service.

CBT asserts that the language of Section 251(f)(2) of the Act makes it clear that Congress clearly intended this provision to apply to all LECs with less that two percent of the nation's access lines.

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FEDERAL COMMUNICATIONS COMMISSION
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REPLY COMMENTS OF CINCINNATI BELL TELEPHONE COMPANY

I. INTRODUCTION

Cincinnati Bell Telephone Company ("CBT"), an independent, mid-size local exchange carrier, submits these reply comments in response to the numerous comments filed in this proceeding relating to the Commission's proposed rules released April 19, 1996 to implement Sections 251 and 252 of the Telecommunications Act of 1996 (the "Act").[2]

In its original comments filed in this proceeding, CBT expressed its concern that the unique circumstances of CBT and other small and mid-size companies may be overlooked when the rules are implemented by the Commission. CBT stressed the need for prompt access charge reform, an overhaul of the current universal service support structure, and rate rebalancing and deaveraging before the provisions of Sections 251 and 252 of the Act can be implemented without adverse economic consequences, particularly to small and mid-size LECs and their customers. The need for these reforms appears to be the sole issue generally

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[2] In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Case No. 96-98, Notice of Proposed Rulemaking, released April 19, 1996. See also, Telecommunications Act of 1996, Pub. L. 104-104, §§ 251-252.

supported throughout the comments filed in this proceeding.[3] CBT strongly encourages the Commission to expeditiously undertake action to institute these necessary and vital reforms.

CBT also recommended that the Commission establish guidelines for determining bona fide requests, technical feasibility, unbundling, pricing, and resale restrictions.[4] CBT submits that the guidelines it recommended represent a reasonable middle ground between those commenters who support strict federal standards and those who assert that implementation of the Act should be left to the states with little or no federal involvement.[5] The approach offered by CBT will provide some degree of uniformity and certainty for both new entrants and incumbent LECs. At the same time, it would not be so restrictive as to eliminate any incentive for parties to reach voluntarily negotiated agreements. Clearly, by including a prominent role for voluntary negotiations in the Act, Congress intended that negotiation would be the preferred method of implementing the requirements of Sections 251 and 252 of the Act. Congress envisioned that voluntary negotiations would lead to economically efficient outcomes representative of a competitive marketplace. The guidelines CBT recommends also provide a meaningful role for state commissions to address technological, geographical and demographic conditions in particular local markets, and are

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[3] See, e.g., Comments of AT&T at p. 2; Comments of Department of Justice ("DOJ") at pp. 7-8, 56-57; Comments of LDDS Worldcom ("LDDS") at p. 67; Comments of United States Telephone Association ("USTA") at p. 3.

[4] CBT Comments at pp. 7, 11, 15, 16, 25, 33.

[5] See generally, Comments of MCI, Comments of Association for Local Telecommunications Services ("ALTS"), Comments of Public Utilities Commission of Ohio ("PUCO"), Comments of National Association of Regulatory Utility Commissioners ("NARUC").

flexible enough to recognize that differences exist between incumbent LECs in economies of scale and scope, and in terms of technological and financial ability.

In promulgating rules through this proceeding, the Commission must not be misled by commenters which contend that all incumbent LECs will resort to unfair practices in negotiations or that the incumbent LEC will always be the more powerful party in negotiations.[6] The Act requires that parties must negotiate in good faith and establishes arbitration and appeal procedures in the event parties are unable to reach voluntary agreements.

Furthermore, federal and state laws contain antitrust provisions under which anticompetitive practices can be investigated and remedied. CBT is by no means suggesting that parties litigate every agreement, but rather is suggesting that there is no reason for the Commission to penalize all incumbent LECs based on speculation about future incumbent LEC behavior. An efficient competitive marketplace will result if all parties have an equal opportunity to compete, not by guaranteeing specific outcomes, as so many of the new entrants to the telecommunications industry are advocating.

Contrary to the claims that incumbent LECs always have an advantage relative to their competitors, the Commission must recognize the powerful position of many large established telecommunications carriers that will be entering the local exchange market. The Commission must also consider the fact that once interconnection is established between carriers, the new entrant will have bargaining power consistent with that of the incumbent

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[6] See, e.g., Comments of DOJ at p. 6; Comments of Tele-Communications, Inc. ("TCI") at pp. 22, 23; Comments of ALTS at p. 8.

LEC since each carrier maintains facilities necessary for the termination of traffic to their end users.[7] Such outcomes necessitate the application of symmetrical regulation for all telecommunications carriers, as supported by CBT.[8]

II. UNDULY BURDENSOME REQUIREMENTS MUST NOT BE PLACED ON CARRIERS

Many of the comments filed in this proceeding by potential new entrants to the market for telecommunications service contain recommendations for very specific standards to be applied to incumbent LECs.[9] Although CBT realizes that the Act imposes certain additional obligations on incumbent LECs, CBT believes that these requirements were designed to ensure good faith negotiations, not to burden the incumbent LECs relative to their competitive counterparts. Therefore, the Commission should not impose any requirements on incumbent LECs that do not enable them to fully recover their costs associated with the requirements of the Act.

Further, the Commission should not impose unrealistic time frames for meeting the requirements of the Act. The time frames for implementation should be negotiated between the LEC and the requesting carrier. Suggestions by some commenters that requests may be fulfilled within a specific time frame are inappropriate.[10] For example, some requests for

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[7] PUCO Comments at pp. 23, 74; Ohio Consumers Counsel ("OCC") Comments at p. 6.

[8] OCC recommends that obligations that are imposed on incumbent carriers should be placed on new entrants as well. OCC Comments at p. 5.

[9] See, e.g., Comments of TRA at pp. 40, 51, 54; Comments of LCI International Telecom Corp. ("LCI") at pp. 30, 31.

[10] See, e.g., Comments of PUCO at p. 32; Comments of MCI at p. 38.

interconnection or unbundled elements will be more complex than others and, therefore, will take longer to implement. In addition, not all LECs will be capable of implementing a particular request in the same period of time due to the differences in their networks and the technology currently deployed in those networks. Neither this Commission nor state commissions can properly specify time frames that will be applicable to all situations.

In its initial comments, CBT addressed many of the issues which would be raised by such unrealistic requirements, and will not now burden the Commission by repeating the arguments on these issues. There are however, several items requested in many comments that deserve special attention in these reply comments.

A. Electronic Ordering, Billing, Provisioning, Maintenance And Repair

CBT is concerned that many of the comments of IXCs and other new entrants suggest that ordering, billing, provisioning, maintenance and repair systems be fully mechanized.[11] The Commission should not prescribe minimum standards in this area. The means by which ordering, billing, provisioning, maintenance and repair are accomplished should be the result of negotiations between the parties, not by inflexible regulatory mandates. It would be unrealistic for the Commission to conclude that all LECs, particularly small and mid-size LECs, will be able to establish new electronic systems to handle these requests immediately or that such a requirement would serve the public interest.

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[11] See, e.g., AT&T Comments at pp.34, 35, 81; MCI Comments at pp.23, 24, 38, 39; LCI Comments at p.20; MFS Comments at p.20; TRA Comments at pp.21, 22.

Such proposed standards, particularly those requiring these mechanized systems to be in place within six months[12], would be unduly economically burdensome for small and mid-size companies to meet. In fact, many significant operating system changes which CBT has undertaken for the benefit of its own customers often require in excess of one year to implement. If left to negotiations, the parties could agree on how and when the systems would be put in place, based on the requesting carrier's needs and the ability of the incumbent LEC to satisfy them. In some cases, the requesting carrier may be willing to use a manual system for a period of time rather than delaying the start of their service while the LEC installs a state of the art electronic system, for which the LEC must be fully compensated by the requesting carrier. Furthermore, based on a cost-benefit analysis, some new entrants, particularly smaller ones, may find that a manual system adequately meets their needs.

If the Commission does prescribe minimum standards for ordering, billing, provisioning, maintenance and repair, CBT asserts that the rules should clearly specify that the requesting carrier is fully responsible for all costs to the LEC of establishing the system or modifying existing systems to meet the carrier's request. Included in the LEC's costs must be all resources, including additional personnel needed to fulfill the request in the required time frame. The rules must also specify that the LEC should in no way be forced to compromise its own service in order to meet established deadlines. In addition, state commissions should be given the authority to waive the minimum standards for small and mid-size LECs, if they find that such systems would not be in the public interest.

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[12] MCI Comments at p.38.

B. Subloop Unbundling Should Not Be Required.

CBT reiterates its position that the minimum elements required to be unbundled under the Act should be loops and ports. The feasibility of providing elements beyond loops and ports should be established through the bona fide request process recommended by CBT in its comments. CBT is particularly concerned by the number of parties suggesting that subloop unbundling should be a minimum unbundled element.[13] First, the technical feasibility of subloop unbundling is questionable at this time, and second, there is currently no demonstrated demand for subloops.[14]

Requiring subloop unbundling is contrary to the Commission's own tentative conclusion that elements be considered technically feasible for unbundling when they are currently provided by a LEC, or have been provided by the LEC in the past. As USTA states, currently no evidence exists that any LECs are unbundling loops into subloops.[15] The Commission in its NPRM was unable to cite an example of actual subloop unbundling. The only reference to this issue in the NPRM is to certain state's that have issued rules requiring subloop unbundling. However, the NPRM does not indicate that subloop unbundling is currently being offered in those states. Thus, CBT questions why the Commission would consider including, as a minimum element for unbundling, something that is not technologically feasible, even by the Commission's own suggested standards.

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[13] See, e.g. , AT&T Comments at p. 19; MCI Comments at p. 29; LCI Comments at p. 17; PUCO Comments at pp. 35-36.

[14] CBT concurs with the Bellcore assessment of subloop unbundling presented as an attachment to Ameritech's comments.

[15] USTA Comments at p.31.

Furthermore, if subloop unbundling is technically feasible, (which is not supported by the current evidence), the fact that it is not deployed in any state would appear to indicate a lack of demand for such service. As indicated in its comments[16], CBT believes that there must be significant demonstrated demand for elements before they are considered as minimum elements for unbundling. Until such demand arises, any requests for subloop elements should be made through the bona fide request process outlined by CBT in its comments.[17]

C. Prices Set At TSLRIC Are Not Fully Compensatory.

Most of the comments filed in this proceeding addressed the pricing issues raised by the Commission in its NPRM. particularly for interconnection and unbundled elements, in quite some detail. Many parties agree that incremental cost is one factor to consider in determining the appropriate price for interconnection and unbundled elements.[18] The differences between the parties arise over whether prices should be required to be set at some form of incremental cost (e.g , LRIC or TSLRIC) or whether incremental cost is only appropriate as a price floor.

CBT restates its position that the TSLRIC method is the appropriate means to develop the cost of a service, but <u>not</u> to set a price for a service. Where a cost is causally related to

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[16] Comments of CBT at pp. 15-16.

[17] Comments of CBT at pp. 7-9.

[18] See, e.g., Comments of AT&T at p. 46; Comments of MCI at p. 61; Comments of ALTS at p. 36; Comments of DOJ at p. 27; Comments of PUCO at p. 41; Comments of USTA at pp. 44, 49; Comments of Ameritech at p. 62; Comments of Bell South at p. 54; Comments of SBC at pp. 96, 97; Comments of Sprint at p. 45.

providing a given service, the cost should be included in the TSLRIC for that service. However, because of the existence of shared and common costs, the sum of the incremental costs for all services will not equal the sum of the company's costs. As a result, CBT disagrees with several parties who continue to argue that prices should be set equal to the TSLRIC of a service. For example, AT&T states that:

> The Commission should establish a rebuttable presumption that the just and reasonable rates for the network elements an accessing carrier seeks are the TSLRICs calculated for those network elements.[19]

CBT believes that recommendations such as this are based on a misuse of the TSLRIC. TSLRIC can only be used to determine if a service is covering its incremental cost. It cannot be used to establish a price; it simply determines the minimum price that can be charged and it is totally appropriate and necessary for prices to exceed the TSLRIC. This point is made by William Baumol and Gregory Sidak in Toward Competition in Local Telephony (The MIT Press, 1994). When discussing the pricing of inputs sold to competitors, they state that:

> ... we must recall that even if every one of a firm's services is sold at a price equal to its average-incremental cost, the firm's total revenues may not cover its total costs. Consequently it is normal and not anticompetitive for a firm to price some or all of its products to provide not only the required profit component of incremental cost, but also some contribution toward recovery of common fixed costs that do not enter the incremental costs of the individual products. The appropriate and viable size of the contribution of a particular product depends in part upon demand conditions for that product; it does not follow any standard markup rule or any arbitrary cost-allocation procedure. Any service whose price exceeds its per-unit incremental cost provides

[19] AT&T Comments at p. 63.

such a contribution in addition to the profit required on the incremental investment contained in the incremental cost.[20]

Some parties also state that prices must equal TSLRIC because they claim that this is what would happen in a competitive market.[21] This is not true. Dr. Richard Emmerson has stated:

> Highly competitive markets supplied by multi-product firms rarely if ever result in prices equal to incremental cost as traditionally measured in telecommunications. For example, prices for identical items sold at different competing supermarkets (often located quite near one another) are not equal to their respective incremental costs, even though such prices are determined by the competitive market.

and

> ... it would be a mistake to select a single service from a multi-service firm (in this case, local switched access charges to interconnecting carriers) and expect its price to be set equal to the traditionally measured incremental cost of the service. Forcing such a situation would not replicate or simulate the competitive process; it would only result in selectively pricing certain products at levels which would not result in a financially viable company if the practice were applied to all services.[22]

CBT believes that some of the parties' justification for this approach is based on a simplistic view of the telecommunications network and the erroneous assertion that there are little or no joint or common costs that need to be recovered. AT&T incorrectly asserts that any joint or common costs that could be allocated and recovered are at best *deminimis*.[23]

CBT disagrees with the assertion that joint or common costs are insignificant, and should not be recovered through interconnection or unbundled element prices. For example,

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[20] William Baumol and Gregory Sidak, Toward Competition in Local Telephony at p. 102.

[21] Comments of AT&T at p. 46.

[22] Rebuttal Testimony of Dr. Richard Emmerson, Application of MFS Intelenet of Pennsylvania, Inc., Pennsylvania Public Utilities Commission, Docket No. A-310203F0002 at pp. 3,4,5.

[23] AT&T Comments at pp. 62, 65.

loop and interoffice facilities often share the same routes. As a result, a cable carrying both loop and interoffice facilities can be attached to the same telephone pole. This pole is clearly shared by the loop and interoffice facilities and cannot be causally attributable to either service. In the same way, shared operating expenses such as the pole maintenance as well as general overheads cannot be attributable to either service. Therefore, it is incorrect to assert that setting prices equal to TSLRIC is acceptable based on the assertion that there are little or no shared or common costs to be of concern.

AT&T appears to claim that setting price equal to TSLRIC is acceptable because the test for cross-subsidy is to compare price with TSLRIC. This claim is either based on a misunderstanding of the issue or represents a mischaracterization designed to support their argument for pricing at TSLRIC. CBT does not dispute that TSLRIC is the appropriate test for determining if a competitive service is receiving a subsidy. This, however, is vastly different than requiring the LEC to set prices at TSLRIC. The Commission should not use TSLRIC as a mechanism to set rates, but rather should prescribe that TSLRIC is the floor for pricing. The amount of recovery of joint, common and embedded costs should be arrived at by the parties during negotiations. This will lead to economically efficient pricing which will in turn send appropriate signals to new entrants to encourage facilities-based competition.[24]

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[24] As Bell Atlantic points out in its comments, requiring incumbent LECs to set prices equal to incremental cost would discourage facilities based competition because new entrants would be able to purchase unbundled elements at a price lower than what it would cost them to build their own facilities. Comments of Bell Atlantic at p. 38

Further, any pricing mechanism that does not allow incumbent LECs to recoup their total cost of providing the service or which requires LECs to offer services for resale at rates below cost is potentially violative of the Takings Clause of the Fifth and Fourteenth Amendments.[25] In its comments, AT&T asserts that costs may be disallowed by the Commission without any violation of the Takings Clause, citing Illinois Bell Tel. Co. v. FCC, 988 F.2d 1254 (D.C. Cir. 1993), as support for this proposition.[26] This case does not support the proposition for which AT&T cites it. In Illinois Bell, the Court of Appeals concluded that because investors were aware of the Commission's rate base policies, some investments could be discounted by the Commission's "used and useful" standard, without the action being confiscatory. Id. at 1263. However, the Court of Appeals pointed out that if it could be shown that the failure to compensate for the investments threatened the financial integrity of the company or otherwise impeded the ability to attract capital, then a takings violation probably would be found. Id.

In this proceeding, the Commission is not considering a rate change, but rather is faced with implementing a fundamental change in the regulatory structure; one which must ensure that incumbent LECs do not have their property confiscated by regulations that do not allow the full recovery of costs.

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[25] See Duquesne Light Co. v. Barasch, 488 U.S. 299, 308-310 (1989)("If the rate does not afford sufficient compensation, the State has taken the use of utility property without paying just compensation and so violated the Fifth and Fourteenth Amendments"); FPC v. Hope Natural Gas Co., 320 U.S. 591, 602 (1944)(carriers must be allowed sufficient return to attract investors).

[26] AT&T Comments at p.70-71, n. 103.

D. Exemptions, Suspensions, And Modifications

Section 251(f)(2) of the Act provides that a LEC with less than two percent of subscriber lines in the country can request a state commission to either suspend or modify the requirements of Section 251(b) and (c). This provision was the result of much debate and consideration throughout the development of the Act by Congress. The language of the provision makes it clear that Congress intended this provision to apply to all LECs with less that two percent of the nation's access lines.

Congress certainly could have established the threshold for application of this provision at a different level or they could have excluded Tier One Carriers altogether. However, Congress did not take either of these steps. For AT&T to suggest in its comments that this provision should not apply to any Tier One Carriers ignores the plain language of the statute.[27] As the OCC states in its comments requesting some quantification of the two percent threshold:

> Thus, only nine holding companies would not be able to apply for a waiver or modification under this section-- the seven RBOCs, GTE and Sprint/United.[28]

AT&T is also incorrect in asking the Commission to issue guidelines which impose a "substantial harm" test under this provision, requiring any suspension or modification granted pursuant to this provision to be "narrowly tailored" to that "particular harm".[29] The statute clearly outlines the standard to be used by state commissions reviewing requests for

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[27] AT&T Comments at p.92.

[28] OCC Comments at p. 48.

[29] AT&T Comments at pp. 92-93.

exemptions, suspensions or modifications from the requirements of the Act. In order for a carrier to be granted a suspension or modification of the requirements of Section 251(b) and (c), the carrier must make a showing that the suspension or modification is necessary:

A) 1) to avoid a significant adverse economic impact on users of telecommunications services generally;

2) to avoid imposing a requirement that is unduly economically burdensome; or

3) to avoid imposing a requirement that is technically infeasible; and

B) is consistent with the public interest, convenience, and necessity.

AT&T, in proposing the adoption of the "substantial harm" test, asks the Commission to go beyond the language of the Act and adopt a standard which is a substantially more stringent and burdensome test than Congress established in the Act. Although the Commission may have the authority to establish guidelines to aid in interpretation and insure the consistent application of Section 251(f)(2), it has no authority to create new and substantially more burdensome standards to be imposed upon LECs beyond those provided for in the Act.

The passage of the Act offers many additional opportunities for new market entrants, IXCs, cable TV companies and RBOCs. However, the Act also creates the possibility of significant burdens being placed on small and mid-size LECs as the competitive market develops. Congress recognized this reality and sought to avoid significant burdens upon small and mid-size LECs by providing a mechanism for the suspension and modification of the requirements of the Act. Congress intended to ensure that small and mid-size companies

could compete effectively in the new competitive marketplace. The Commission should recognize this clear intent of Congress in enacting this provision in its regulations.[30]

III. CONCLUSION

CBT respectfully requests that the Commission consider these comments as it develops regulations and guidelines related to the interconnection issues raised in the Act. CBT submits that in order for the Commission to be consistent with the intent of the Act, rules or regulations which are promulgated as a result of this proceeding must reflect the significant differences between small and mid-size LECs and their much larger counterparts. The significance of overhauling the current universal service support structure, access charge reform, rate rebalancing and deaveraging cannot be overstated. These reforms must occur simultaneously, alongside actions taken as a result of this proceeding, in order to develop a truly competitive marketplace in which all companies have an equal opportunity to compete. Regulations which unduly hamper incumbent LECs by setting rates below cost will raise significant legal questions and will ultimately slow the progress toward the competitive

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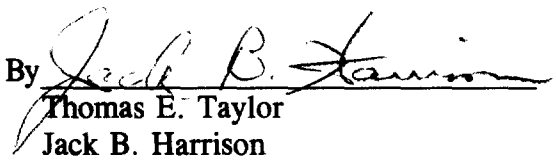
[30] In fact, CBT was specifically mentioned in the Congressional record by Representative Portman who stated: "I intend to urge our conferees to pay particular attention to the needs of people served by independent companies like Cincinnati Bell when we turn to resolving the differences between the House bill and the Senate Bill." August 4, 1995, Congressional Record H8499.

telecommunications market envisioned by the Act.

Respectfully submitted,

FROST & JACOBS

By 
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Dated: May 30, 1996

0312549.03

CERTIFICATE OF SERVICE

The undersigned hereby certifies that copies of the foregoing **Reply Comments of Cincinnati Bell Telephone Company** have been delivered by first class United States Mail, postage prepaid, on May 30, 1996, to the persons on the attached service list.

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